KCRA-TV *and* Peter A. Arakelian, Petitioner and International Brotherhood of Electrical Workers, Local 202. Case 20-RD-1759

29 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections to a combined mail and manual ballot election held 1 December 1982 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 63 for and 60 against the Union, with 3 challenged ballots, a sufficient number to affect the results, and 1 void ballot; there are also 2 mail ballots that were not counted at the conclusion of the election.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings and recommendations[1] only to the extent consistent with this Decision and Order.

1. The Employer operates a television station in Sacramento, California. The Union's Objection 2 alleges that at an employee meeting on 29 November 1982, John Kelly, the station's owner, impliedly promised to institute a grievance procedure similar to one in effect at a banking system he owns if the employees voted to decertify the Union. The hearing officer, relying on *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), recommended that we sustain this objection. The pertinent facts are as follows.

On 29 November 1982 John Kelly conducted an employee meeting to discuss issues in the decertification election. Several employees questioned Kelly about the station's policies if the Union were decertified. When Kelly refused to state what the station's policies would be, the employees insisted that he give them "a little bit of an idea." An employee then asked how the station would resolve employee problems if there were no contractual grievance procedure. Kelly replied that he could not make any promises and that, while he would give an example, he was "not saying that this is the way it would happen." He explained that at the River City Bank, a nonunion system of banks he owned, he discussed employee complaints periodically with an employee committee at an "informal dinner-type meeting." As a result of these discussions, Kelly said that sometimes the problems were resolved and sometimes they were not.

We disagree with the hearing officer's findings that this case is "remarkably similar" to *Etna*, and that Kelly had impliedly promised the station's employees a new grievance procedure if the Union were decertified. In *Etna*, the Board concluded that an employer impliedly promised increased benefits if the employees voted to decertify the union, because the employer went to extraordinary efforts to show that unrepresented employees at nonunion mines had greater benefits than those enjoyed by employees at its union mine. The employer's efforts included preparing individually tailored charts for each of its 40 employees, which compared the differences in benefits between an unidentified nonunion pension and IRA plan, and their existing union pension plan. Because the employees knew that the employer operated a nonunion mine, the Board set the election aside because "it seems very difficult to believe the Employer would go to such effort for each and every employee unless it intended the employees to believe the pension benefits presented were more than a mere possibility."[2]

We find, instead, that *Viacom Cablevision of Dayton*, 267 NLRB 1141 (1983), controls this case[3] and that *Etna* is distinguishable for the following reasons. First, Kelly on at least two occasions during the meeting cautioned the employees that he was not promising anything if the election resulted in the Union's decertification. Second, Kelly's reference to the grievance procedure at his nonunion banks was a casual response to persistent employee questioning that he give them "a little bit of an idea" of station policies if the Union were decertified. His response is strikingly dissimilar to the employer's calculated scheme in *Etna* of holding three dinner meetings at which the greater pension benefits of nonunion employees were emphasized, culminating in the distribution to each employee of an individually tailored chart comparing pension benefits under the union and the nonunion plans. Third, while the Union could emphasize the superiority of the existing contractual grievance proce-

[1] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule the challenges to the ballots of Robert Johnston and D'Anne Ousley, to sustain the challenge to the ballot of Randall Smith, and to overrule the Union's Objection 1.

[2] *Etna Equipment & Supply Co.*, supra, 243 NLRB at 597. Member Hunter notes that he did not participate in *Etna Equipment* and that the discussion of the case herein does not indicate his approval or disapproval of its result.

[3] In *Viacom*, the Board found no implied promise of increased benefits where the employer truthfully advised the employees that some of its nonunion employees received higher wages than they did, but repeatedly refused to promise a wage adjustment should the employees vote to decertify the union. The Board emphasized that a comparison of benefits "is not *per se* objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that [benefits] would be adjusted if the Union were voted out." Id., slip op. at 4.

dure in resolving employee complaints, Kelly, in response to employee questioning, could also explain that the station would continue to resolve employee complaints even in a nonunion setting by giving an example of how this might be done.

For these reasons, we overrule the Union's Objection 2 and conclude that Kelly did not impliedly promise the station's employees the grievance procedure in effect at his nonunion banks should the employees reject the Union.

2. The Employer's Objections 1 and 2 allege that the Regional Director improperly refused to count the mail ballots cast by employees Carol Bland and Susan Goldwater Gregory. The hearing officer recommended that both ballots be counted, after finding that the Regional Office properly sent mail ballots to both employees. The pertinent facts are as follows.

On 2 November 1982 the Regional Director approved the Stipulated Election Agreement, which provided for an election in a unit consisting of certain of the station's employees at its Sacramento, Stockton, Modesto, and San Francisco locations. The parties agreed that the election would be held at the Employer's Sacramento offices on 1 December 1982, and that the "San Francisco, Modesto [and] Stockton employees will vote by U.S. Mail under the direction and supervision of the Regional Director." On 26 November 1982 the Employer's attorney telephoned the Regional Office and requested that the Board send mail ballots to Sacramento employees Carol Bland and Susan Goldwater Gregory. The Employer's attorney did not seek the consent of either the Petitioner or the Union or ask the Regional Office to seek their consent before requesting the mail ballots. The Regional Office sent the mail ballots as requested and received both back after the stipulation's deadline of 5 p.m. on 30 November 1982, but before the ballots were counted at the conclusion of the manual election. Neither mail ballot has been opened.

We disagree with the hearing officer and conclude that the Regional Director properly refused to count the mail ballots Carol Bland and Susan Goldwater Gregory cast. A party to an agreement authorizing a consent election "is entitled to expect that other parties and agents of the Board will diligently uphold provisions of the agreement that are consistent with Board policy and are calculated to promote fairness in the election."[4] We will not set aside an election for every breach of an election agreement; rather, "election results should be overturned only if the breach is material or prejudicial, in the sense that the conduct causing the breach significantly impairs the fairness of the election process."[5]

We find that the Stipulated Election Agreement was materially breached when the Board agent sent mail ballots to two employees who were ineligible to receive them. The parties intended, by signing the stipulation, that the Sacramento employees had to cast their votes in person or not at all, and that only the San Francisco, Modesto, and Stockton employees could mail their ballots because of the distance in traveling to the Employer's Sacramento office to cast their votes in person. Because the stipulation barred Sacramento employees from voting by mail, the Board agent erred in sending mail ballots to Carol Bland and Susan Goldwater Gregory. Contrary to the hearing officer, the NLRB Casehandling Manual does not authorize the action the Board agent took. Rather, it provides that in a "mixed" manual-mail election, "[m]ail ballots should not be sent to those who are . . . ill, either at home or in a hospital, are on vacation, or are on leave of absence due to their own decision or condition."[6] Neither employee was entitled to a mail ballot under this provision because Carol Bland's request was based on her leaving town on vacation, and Susan Goldwater Gregory's request was based on an illness in her family.

Any harm caused by the stipulation's breach was further aggravated by the fact that the Employer's attorney arranged for both employees to vote by mail after a union shop steward had informed Susan Goldwater Gregory previously that it "wasn't possible" to vote by mail. Such an "arrangement" may have created an appearance that the Board was granting a special favor to the Employer. Under the circumstances, allowing Carol Bland and Susan Goldwater Gregory to cast mail ballots, especially without prior agreement of the other parties, may have tended to destroy the confidence of all parties in the Board's election process.[7]

For these reasons, we overrule the Employer's Objections 1 and 2 and conclude that the Regional Director properly refused to count the mail ballots employees Carol Bland and Susan Goldwater Gregory cast.

While the mail ballots Carol Bland and Susan Goldwater Gregory cast should not be counted, it

[4] *Summa Corp. v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980). Accord: *NLRB v. Granite State Minerals*, 674 F.2d 101, 102 (1st Cir. 1982.)

[5] *Summa Corp. v. NLRB*, supra, 625 F.2d at 295. *NLRB v. Granite State Minerals*, supra; *New England Lumber Division of Diamond v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981); *Grant's Home Furnishings*, 229 NLRB 1305, 1306 (1977).

[6] NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11336.1.

[7] Member Hunter places no reliance on the foregoing discussion that the Region's action may have tended to destroy the parties' confidence in the election process.

is possible that, had the Board agent not erred in sending them mail ballots, both of them would have cast their votes in person. Even had both voted in person, however, their votes would not have been outcome determinative if either Robert Johnston or D'Anne Ousley, whose ballots will be opened and counted pursuant to this Decision and Order, voted for the Union.[8]

Accordingly, we remand this case to the Regional Director to open and count the ballots of Robert Johnston and D'Anne Ousley and to serve on the parties a revised tally of ballots. If either Robert Johnston or D'Anne Ousley voted for the Union, the fact that the mail ballots of Carol Bland and Susan Goldwater Gregory are not counted could not affect the results of the election. Consequently, the Board agent's mistake in sending them mail ballots would be harmless error. In this event, the revised tally of ballots would show that the Union has secured a majority of the votes cast, and the Regional Director should certify the Union.

On the other hand, if neither Robert Johnston nor D'Anne Ousley voted for the Union, then the votes of Carol Bland and Susan Goldwater Gregory would be outcome determinative, and the Board agent's mistake cannot be dismissed as harmless error. In this event, the Regional Director should set aside the election and conduct a second election.

[8] As noted, the tally of ballots shows 63 votes for and 60 against the Union. If either Robert Johnston or D'Anne Ousley voted for the Union, the revised tally of ballots would show 64 votes for and 61 against the Union. Even assuming Carol Bland and Susan Goldwater Gregory appeared at the polls and voted against the Union, the tally of ballots would be 64 votes for and 63 against the Union. Thus, their votes would not be outcome determinative if either Robert Johnston or D'Anne Ousley voted for the Union.

ORDER

It is ordered that the challenge to the ballot of Randall Smith be sustained.

IT IS FURTHER ORDERED that the Regional Director for Region 20 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Order, open and count the ballots of Robert Johnston and D'Anne Ousley, and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. In the event the revised tally of ballots shows that the Union received a majority of the votes cast and the mail ballots of Carol Bland and Susan Goldwater Gregory are not determinative of the election results, the Regional Director shall certify the Union. However, in the event that the revised tally of ballots shows that the mail ballots of Carol Bland and Susan Goldwater Gregory would be determinative of the election, the Regional Director shall set aside the election and hold a second election.